IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1453

Supreme Court, U.S.
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ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,

Petitioners,

—v.—

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI OR MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OR MANDAMUS

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April 10, 1987

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether this Court's remand order barred the court of appeals from reconsidering its previous decision on petitioners' 1916 Antidumping Act claims, which had been explicitly premised on its now-overturned and vacated Sherman Act decision?

2. Whether this Court should reassess the voluminous record to determine whether the court of appeals, after reviewing this record for a second time, correctly concluded that there is no evidence sufficient to raise a triable issue with respect to the specific predatory intent required to support petitioners' claims of concerted and individual dumping under the 1916 Antidumping Act?

PARTIES TO THE PROCEEDING

Respondents are Matsushita Electric Industrial Co., Ltd., Matsushita Electric Corporation of America, Matsushita Electric Trading Co., Ltd., Matsushita Electronics Corporation, Toshiba Corporation, Toshiba America, Inc., Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha, Hitachi Sales Corporation of America, Mitsubishi Electric Corporation, Mitsubishi Electric Sales America, Inc., Mitsubishi Corporation, Mitsubishi International Corporation, Sanyo Electric Co., Ltd., Sanyo Electric Trading Co., Ltd., Sanyo Electric Inc., Sanyo Manufacturing Corporation, Sharp Corporation, and Sharp Electronics Corporation.*

Petitioners are Zenith Radio Corporation ("Zenith") and National Union Electric Corporation ("NUE").

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* The statements required by Rule 28.1 of this Court are attached hereto.

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COUNTER-STATEMENT OF THE CASE

The petition portrays the court of appeals as reflexively dismissing petitioners' 1916 Act claims under the mistaken impression that this Court's mandate compelled that result.[1] In fact, however, the court of appeals carefully considered petitioners' dumping claims on their own merits. It rejected them for the sole and sufficient reason that they were unsupported by evidence of the requisite intent under the 1916 Act to injure or destroy a United States industry. This fact-bound ruling on the sufficiency of the record evidence plainly does not merit a grant of certiorari, particu-

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1 The Antidumping Act of 1916, 15 U.S.C. § 72, is referred to herein as the "1916 Act."

larly in the absence of any conflict among the circuits or with this Court's prior decisions. That conclusion is evident upon a review of the prior proceedings in this case.

District Court Proceedings

As petitioners have emphasized throughout this sixteen year old litigation, the gravamen of their claims is that respondents allegedly engaged in a predatory conspiracy to:

> raise, fix and maintain artificially *high* prices for television receivers sold by [respondents] in Japan and, at the same time, to fix and maintain *low* prices for television receivers exported to and sold in the United States.

106 S. Ct. 1348, 1351 (1986) (quoting 723 F.2d 238, 251 (1983)). According to petitioners, this alleged "unitary" conspiracy violated sections 1 and 2 of the Sherman Act, as well as the 1916 Act. Petitioners also allege individual violations of the 1916 Act, but these claims are based upon the same allegations of a predatory pricing conspiracy.[2]

In 1975, the district court denied a motion to declare the 1916 Act unconstitutionally vague, holding that the Act's specific intent provision, which requires a showing that the respondents engaged in continuous and systematic international price discrimination with a "*specific, predatory, anti-competitive intent*," saved the statute from constitutional infirmity. 402 F. Supp. 251, 259 (1975) (emphasis added). Thereafter, on April 14, 1980, the district court dismissed petitioners' 1916 Act claims as to all but a few products on the

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2 As the district court found, "Zenith has, in colloquial terms, 'put all its eggs in one basket'—the 'unitary' conspiracy basket." 513 F. Supp. 1100, 1326, 1327 & n.396 (1981). Petitioners have never attempted to attribute separate injury or damages to alleged 1916 Act violations by any individual respondent; all of petitioners' injury and damage claims have been based solely upon the single predatory conspiracy that has been alleged. *Id.* at 1325-27 & n.396. Petitioners also claim violations of section 73 of the Wilson Tariff Act, section 2(a) of the Robinson-Patman Act and section 7 of the Clayton Act—but these claims too are based upon the same unitary conspiracy allegations. *Id.* at 1164, 1326, 1329.

ground that the consumer electronic products ("CEPs") sold by respondents in the United States were not "comparable" to those sold by respondents in Japan, as required by that statute. 494 F. Supp. 1190 (1980).

On March 27, 1981, the district court addressed all of petitioners' remaining claims. The court found the evidence insufficient to create a genuine issue of material fact as to the existence of the alleged unitary conspiracy to sell CEPs at high prices in Japan and at low, predatory prices in the United States. Accordingly, the district court granted summary judgment dismissing all of petitioners' conspiracy claims. 513 F. Supp. 1100 (1981). The district court also granted summary judgment against petitioners' remaining individual claims under the 1916 Act. 513 F. Supp. at 1316 n.372, 1334 n.411.[3]

Court Of Appeals Proceedings

On December 5, 1983, the court of appeals issued two opinions. First, it reversed the district court's conspiracy ruling, holding that there was sufficient evidence to create a triable issue as to the existence of the alleged predatory pricing conspiracy and to tie all defendants, except Sony, Sears, and Motorola, to that conspiracy. 723 F.2d at 316. The court of appeals affirmed the grant of summary judgment as to Sony, Sears, and Motorola. *Id.* at 319.

In its second opinion, the court of appeals reviewed the grant of summary judgment as to the 1916 Act claims. 723 F.2d 319 (1983). The court first overturned the district court's ruling that the products at issue were not comparable under the 1916 Act. *Id.* at 324-26. It then considered alternative grounds for

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3 The district court stated that:

> plaintiffs have not demonstrated . . . the existence anywhere in the record of any evidence that would tend to show that any of the requisites of the 1916 Antidumping Act have been met, nor of any evidence that would create a genuine issue of material fact with respect to any conspiracy claims concerning such products.

513 F. Supp. at 1316 n.372. All of petitioners' individual claims under the Clayton and Robinson-Patman Acts were also dismissed. *Id.* at 1323-31.

sustaining the grant of summary judgment and expressly adopted the district court's conclusion that the 1916 Act was intended to prohibit only "anticompetitive" price discrimination and that the specific predatory intent requirement of the statute saved it from constitutional attack. *Id.* at 324, 326.

Next, the court of appeals considered petitioners' claims that the alleged predatory pricing conspiracy also violated the 1916 Act. The court of appeals adopted the same conclusions concerning the sufficiency of petitioners' 1916 Act conspiracy evidence as it had reached with respect to the identical evidence relied upon in support of petitioners' Sherman Act conspiracy claims. *Id.* at 328.

Finally, the court of appeals considered whether there was sufficient evidence to create a genuine issue of fact as to the specific predatory intent required by the 1916 Act. As to all defendants except Sony, Sears, and Motorola, the court of appeals ruled that this intent requirement could be satisfied by the evidence which it had found sufficient to raise a triable issue of the alleged predatory pricing conspiracy in its Sherman Act opinion. *Id.* Accordingly, the court of appeals reversed the grant of summary judgment in favor of respondents on petitioners' 1916 Act claims. *Id.* at 328-29. As for Sony, Sears, and Motorola, because the court of appeals found insufficient evidence to tie these defendants to the alleged predatory pricing conspiracy, the court searched the record for other evidence that could raise a triable issue as to specific predatory intent. Finding none, it affirmed the dismissal of all individual and conspiratorial 1916 Act claims against these three defendants. *Id.* at 328-30.

Supreme Court Proceedings

On March 26, 1986, this Court reversed the court of appeals' Sherman Act decision and remanded for further proceedings consistent with this Court's opinion. 106 S. Ct. at 1362. This Court rejected as insufficient the evidence proffered by petitioners in support of their conspiracy claims. Accordingly, it held that respondents were entitled to the reinstatement of

summary judgment against petitioners' Sherman Act claims unless the court of appeals, on remand, found "other evidence" in the record that was "sufficiently unambiguous" to permit a trier of fact to find that respondents engaged in the alleged predatory pricing conspiracy. *Id.* at 1362. This Court did not review the court of appeals' 1916 Act decision. *Id.* at 1352 n.3.

Remand Proceedings

On April 18, 1986, respondents moved the court of appeals to reconsider and amend its 1916 Act judgment because that judgment had been expressly premised upon the court of appeals' now-overturned ruling on the sufficiency of petitioners' evidence of the alleged predatory pricing conspiracy. Petitioners opposed this motion. The court of appeals issued an order directing the parties to address:

> a) the appropriate disposition of the Sherman Act claims in light of the Supreme Court's direction on remand, [and]
>
> b) whether the law with respect to permissible inferences of concert of action announced by that Court for Sherman Act claims applies to concert of action issues arising under other statutes such as the Antidumping Act of 1916, and if so what disposition should be made of the Antidumping Act claims.

(A-12).

After full briefing by the parties, the court of appeals first searched the record for any "other evidence" of the alleged predatory pricing conspiracy and found that no such evidence existed. (A-10). Accordingly, it reinstated summary judgment against all of petitioners' Sherman Act claims. (*Id.*) Petitioners do not seek review of that determination. Next, having found that there was "insufficient evidence of a conspiracy to price predatorily in the American market," the court of appeals concluded that it was necessary to reconsider its previous

disposition of petitioners' 1916 Act claims. The court of appeals found "no other evidence tending to show that any of the defendants still in the case dumped consumer electronic products with the required intent to injure or destroy a United States industry." It therefore reinstated summary judgment against both petitioners' conspiratorial and individual 1916 Act claims. (A-10-11).

Petitioners chose not to file a petition for rehearing. On March 11, 1987, they filed the instant petition for a writ of certiorari or, in the alternative, of mandamus.

REASONS FOR DENYING THE PETITION

Petitioners do not claim any conflict among the lower courts or with this Court's precedents calling for review by this Court. Nor do petitioners contest that the 1916 Act requires proof of a specific intent to injure or destroy an industry in the United States. (Pet. 7, 13). Petitioners simply mischaracterize the basis for the court of appeals' amendment of its 1916 Act judgment in an effort to obscure the fact that *petitioners are really asking this Court to review the court of appeals' fact-bound determination that there is no evidence in the record to establish the specific predatory intent required to support petitioners' 1916 Act claims.* This case-specific, fact-based ruling presents no issues worthy of review by this Court.

I. THE COURT OF APPEALS' AMENDMENT OF ITS 1916 ACT JUDGMENT WAS CORRECT AND RAISES NO ISSUE WARRANTING CERTIORARI OR MANDAMUS

Petitioners misstate the reasons why the court of appeals amended its 1916 Act judgment. Contrary to petitioners' assertion that the court of appeals believed that this Court's mandate compelled it to dismiss petitioners' 1916 Act claims (Pet. 10-11), the court of appeals recognized that this Court had not reviewed the court of appeals' 1916 Act decision. As

explained below, the court of appeals determined on its own to amend its prior 1916 Act judgment, which had been expressly predicated on its now-overturned Sherman Act decision.

The court of appeals asked for, and received, extensive briefing by the parties on the proper disposition of petitioners' 1916 Act claims. Following this briefing, and its comprehensive review of the evidence canvassed by the parties, the court of appeals: (i) reaffirmed its prior holding that the 1916 Act requires evidence of specific predatory intent (A-10); (ii) stated that its previous holding that there was sufficient evidence in the record to raise a triable issue as to such intent had been explicitly based upon its now-overturned ruling that there was sufficient evidence of the alleged conspiracy to price predatorily (*id.*); and (iii) concluded that since the evidence of a conspiracy to price predatorily was insufficient, and since there was no other evidence of specific predatory intent in the record, its 1916 Act rulings had to be amended. (*Id.*) As explained by the court of appeals:

> With respect to the [1916 Act] conspiracy claims, we earlier held 'that the evidence supporting plaintiffs' theory that defendants entered into the alleged conspiracy also creates a genuine issue of fact as to whether defendants agreed to dump [consumer electronic products] on the United States market with the specific intent to destroy or injure an industry in the United States.' [723 F.2d] at 328. Since the Sherman Act conspiracy charge failed in the Supreme Court, our holding on the Antidumping Act must fail with it. The Antidumping Act claims against individual Japanese manufacturers are equally vulnerable because we relied, in reversing summary judgment on those claims, on the evidence tending to show that the individual manufacturers joined in a conspiracy to sell in the American market at predatory prices. 723 F.2d at 329. *There is no other evidence tending to show that any of the defendants still in the case dumped consumer*

electronic products with the required intent to injure or destroy a United States industry.

(A-10-11) (emphasis added).

In reconsidering its 1916 Act decision, the court of appeals exercised its clear authority under 28 U.S.C. § 2106.[4] Petitioners claim this reconsideration "exceeded the scope of this Court's mandate" and cite as authority for this contention a fragment of the opinion in *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). But petitioners omit the relevant part of *Sanford*, in which this Court stated that, on remand: "the Circuit Court may consider and decide any matters left open by the mandate of this court. . . ." *Id.* at 256. *See also Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979). Because petitioners' 1916 Act claims were "left open" by this Court, it was entirely appropriate for the court of appeals to reconsider them.

The court of appeals' reconsideration and amendment of its 1916 Act decision was thus proper in all respects. The court of appeals simply recognized that its earlier 1916 Act holding was no longer valid and concluded that, because there was no evidence in the record capable of establishing the predatory intent required by the 1916 Act, petitioners' claims under this statute had to be dismissed.

This outcome was foreshadowed by the court of appeals' previous affirmance of the dismissal of petitioners' 1916 Act claims against Sony, Sears, and Motorola (which petitioners neither challenged nor criticized). In that decision, the court of

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4 That statute states that:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106. *See American Iron and Steel Inst.* v. *EPA*, 560 F.2d 589 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978); *see also Gondeck* v. *Pan American World Airways, Inc.*, 382 U.S. 25 (1965); *United States* v. *Ohio Power Co.*, 353 U.S. 98 (1957).

appeals, having found that there was insufficient evidence to tie these defendants to the alleged predatory pricing conspiracy, searched the record for any other evidence capable of satisfying the 1916 Act's specific predatory intent requirement. 723 F.2d at 329-30. Finding no such other evidence, the court of appeals dismissed petitioners' 1916 Act claims against these three defendants, explaining that:

> Plaintiffs have produced no direct evidence that Sony, Sears, or Motorola sold low-price CEPs in the United States with the intent to injure or destroy the CEP industry in this country. The only circumstantial evidence in this record that even marginally supports the inference that these three defendants each acted with specific predatory intent is evidence that they sold imported CEPs at substantially lower prices in the United States than the prices at which comparable CEPs were sold in Japan, and evidence that they knew that the other defendants were engaging in similar activity and that concerted dumping could injure or destroy the CEP industry in the United States. *Although this evidence might support a finding of general intent, we do not believe that this evidence creates a genuine issue of fact as to whether Sony, Sears, and Motorola each acted with the specific predatory intent required by the 1916 Act.*

Id. (emphasis added).

On remand, the court of appeals performed the same analysis and reached exactly the same conclusion with respect to respondents. (A-10-11). Nothing in this Court's mandate precluded this reconsideration and amendment of the court of appeals' prior 1916 Act judgment, and neither certiorari nor mandamus is warranted to review the propriety of the court of appeals' action.

II. PETITIONERS HAVE RAISED NO OTHER ISSUE MERITING A GRANT OF CERTIORARI

A. The Court Of Appeals' 1916 Act Decision Is A Fact-Bound Holding Which Raises No Important Legal Issues

In determining to reinstate summary judgment against petitioners' 1916 Act claims, the court of appeals searched the enormous record in this case for any evidence of specific predatory intent. The court concluded that "there is no evidence in the record supporting an inference of a predatory pricing conspiracy" by respondents, other than that rejected as insufficient by this Court, and that there "is no other evidence tending to show that any of the [respondents] dumped consumer electronic products with the required intent to injure or to destroy a United States industry." (A-6, A-11).

Petitioners do not dispute that evidence of such an intent is required to support a 1916 Act claim. (Pet. 7, 13). They could not, for the statute expressly requires an "intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce . . . in the United States." 15 U.S.C. § 72. The petition presents nothing more than petitioners' disagreement with the court of appeals' conclusion that such an intent cannot be established from the record in this case. This fact-bound conclusion does not warrant Supreme Court review.

In their efforts to escape the consequences of their failure of proof, petitioners confuse the broader concept of international price discrimination, dealt with under the administrative anti-dumping law, with the much narrower category of dumping with specific predatory intent prohibited by the 1916 Act.[5] As the court of appeals ruled, Congress made it clear, in enacting the 1916 Act, that the statute was carefully crafted to prohibit only "dumping" engaged in with a specific predatory motive. 723 F.2d

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5 *Compare* 19 U.S.C. §§ 1673-1677h *with* 15 U.S.C. § 72.

at 325 n.4, 327-28. Petitioners' argument simply ignores this critical limit on the scope of the 1916 Act.[6]

Petitioners correctly note that the respected commentator Jacob Viner used the generic term "dumping" to refer to a wide variety of forms of international price discrimination—some anticompetitive and some not. (Pet. 15 n.14). They fail to point out, however, that Professor Viner also recognized that the 1916 Act was not intended to prohibit all of these different kinds of "dumping." In a portion of his treatise not quoted by petitioners, Professor Viner stated:

> The antidumping provision of the Act of 1916 has also been criticized on the ground that in confining its penalties to the common and systematic practice of predatory dumping it *fails to provide remedies . . . against other types of dumping which may be injurious to American industry though not predatory in intent or not provable to be so.* But these are not so much criticisms of the effectiveness of the measure in attaining its objectives as of the limited character of these objectives. *It was intended to reach only predatory dumping.* . . .

J. Viner, *Dumping: A Problem in International Trade* 245 (1966 ed.) (emphases added) (footnote omitted).[7] Indeed, Professor Viner noted that it was precisely because the 1916 Act prohibited

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6 In proposing the legislation which ultimately became the 1916 Act, Secretary of Commerce Redfield stated that the statute "should not prohibit the pricing practices of normal competition, but only those based on predatory motive." 723 F.2d at 325 n.4. Protectionist-minded opponents tried to eliminate the predatory intent clause from the 1916 Act, arguing that it would so emasculate the antidumping law as to provide little or no protection to American industry. *See* 53 Cong. Rec. 13080 (1916) (Statement of Sen. Penrose); 53 Cong. Rec. App. 1476 (1916) (Statement of Rep. Denison); 53 Cong. Rec. App. 1535 (1916) (Statement of Rep. Bacharach); 53 Cong. Rec. 13490 (1916) (Statement of Sen. Colt); 53 Cong. Rec. App. 1470 (1916) (Statement of Rep. Mott). But the House expressly rejected this proposal, reaffirming its desire to limit the prohibited behavior to that engaged in with a specific predatory intent. 53 Cong. Rec. 10751 (1916).

7 *See also* W. Culbertson, *Commercial Policy in War Time and After* 153 (1919).

only predatory dumping that Congress later enacted the very different and broader administrative remedies contained in the 1921 Antidumping Act (now contained in Title VII of the Tariff Act of 1930, as amended), which did not contain *any* intent proviso. *Id.* at 258-59.[8]

The predatory intent requirement of the 1916 Act is necessary because that statute provides for criminal sanctions and a treble damage remedy. The legislative framework makes it clear that, although Congress was willing to provide administrative remedies for dumping without any intent requirement, it would permit the severe penalties provided in the 1916 Act *only* upon a showing of specific predatory intent.

Indeed, to ignore the 1916 Act's predatory intent requirement, as petitioners propose, would bring that statute into fundamental conflict with antitrust policies by failing to distinguish between pro-competitive and anticompetitive pricing behavior.[9] Both the district court and the court of appeals recognized that the 1916 Act is rooted in antitrust principles. 402 F. Supp. at 262; 494 F. Supp. at 1197, 1201, 1215, 1220; 723 F.2d at 324-25 & n.4.

In sum, petitioners' entire discussion of the economic motivations for non-predatory dumping is irrelevant. Petitioners fail to recognize the critical differences between the broad category of "dumping" dealt with in the protectionist administrative antidumping law—which is not at issue in this case—and the much more limited predatory and anticompetitive dumping prohibited by the 1916 Act.[10] The only issue presented by the petition is

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8 *See also* U.S. Tariff Commission, *Dumping and Unfair Foreign Competition in the United States* 20, 33-34 (1919).

9 *Cf. Great Atl. & Pac. Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979) (interpretations of the domestic price discrimination law should not " 'extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation' ") (quoting *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 63 (1953)).

10 In this connection, petitioners mischaracterize, and attach as appendices to their petition, certain administrative determinations against respondents under the 1921 Antidumping Act, without pointing out that there is no intent requirement contained in that statute. (Pet. 18, A-42).

whether the court of appeals correctly concluded, after thoroughly reviewing the record for a second time, that there is no evidence of the specific predatory intent required by the 1916 Act. That conclusion can hardly be questioned since it is obvious that such a predatory intent cannot be inferred from what *petitioners now concede to be "profitable" pricing behavior by respondents in the United States*. (Pet. 17).[11] The court of appeals canvassed the entire record for any evidence which would convert such profitable pricing into evidence of predatory intent and found none. There is no reason for this Court to review that fact-bound determination.

B. There Is No Conflict Among The Lower Courts Or With This Court's Precedents That Would Warrant A Grant Of Certiorari

Petitioners do not claim that there is a conflict among the lower courts with respect to the issues the petition seeks to raise. This is not surprising since, in the seventy-one year history of the 1916 Act, there have been only two reported appellate decisions (other than those in this case) under that statute: a 1935 opinion on a discovery issue[12] and a 1985 opinion on a standing question.[13] District court opinions construing the 1916 Act are also extremely scarce and of no relevance to the petition.[14]

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11 Petitioners' concession that respondents charged "profitable" U.S. prices belies their earlier assertions of "long term, below-cost sales," upon which four Justices apparently relied, at least in part, in dissenting from this Court's conspiracy decision. 106 S. Ct. at 1366 (White, J., dissenting).

12 *H. Wagner & Adler Co.* v. *Mali*, 74 F.2d 666 (2d Cir. 1935).

13 *Western Concrete Structures Co.* v. *Mitsui & Co. (U.S.A.), Inc.*, 760 F.2d 1013 (9th Cir.), *cert. denied*, 106 S. Ct. 230 (1985).

14 *Isra Fruit Ltd.* v. *Agrexco Agricultural Export Co.*, 631 F. Supp. 984 (S.D.N.Y. 1986) (standing); *Jewel Foliage Co.* v. *Uniflora Overseas Florida, Inc.*, 497 F. Supp. 513 (M.D. Fla. 1980) (standing); *Schwimmer* v. *Sony Corp. of America*, 471 F. Supp. 793 (E.D.N.Y. 1979), *aff'd*, 637 F.2d 41 (2d Cir. 1980) (standing); *Outboard Marine Corp.* v. *Pezetel*, 461 F. Supp. 384 (D. Del. 1978) (requirement of foreign sale); *Bywater* v. *Matsushita Elec. Indus. Co.*, 1971 Trade Cas. (CCH) ¶ 73,759 (S.D.N.Y. 1971) (standing).

Similarly, petitioners do not claim that the court of appeals' 1916 Act decision conflicts with Supreme Court precedent. No such assertion could be made, since this Court has never considered a 1916 Act claim. In view of the small amount of litigation commenced under the 1916 Act over the last seventy years, and the complete absence of conflicting authority, review by this Court is plainly unwarranted.

C. Petitioners' "Trade Policy" Complaints Are Without Merit And Are Inappropriate For Consideration By The Courts

Petitioners criticize the court of appeals' 1916 Act decision for allegedly leaving U.S. industry with no effective remedy against "unfair competitive practices." (Pet. 19). This criticism is not only wrong on the merits, but is directed to the wrong forum.

First, the fact that petitioners were unable to produce any evidence to satisfy the 1916 Act's specific predatory intent requirement will not have any adverse effect on future 1916 Act plaintiffs. A finding that there has been a failure of proof in one case does not mean that there is no effective remedy for those who can prove their claims.

Second, the 1916 Act is far from the only remedy available to U.S. industry for responding to alleged unfair foreign competition. Congress has enacted numerous statutes, containing a variety of trade remedies, to address such concerns.[15] Most notably, petitioners do not even mention the administrative mechanisms created by the 1921 Antidumping Act to impose duties for the type of non-predatory dumping discussed in the petition. As Professor Viner explained, that statutory scheme was expressly enacted to reach "dumping" activity beyond the purview of the narrow category of predatory conduct condemned by the 1916 Act. *See* J. Viner, *Dumping: A Problem in International Trade* 245 (1966 ed.).

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15 *See, e.g.*, 19 U.S.C. §§ 1671-1671h (countervailing duty); 19 U.S.C. §§ 1673-1677h (antidumping duty); 19 U.S.C. § 1337 (unfair practices in imports); 19 U.S.C. § 2411 (unfair trade practices).

Finally, petitioners' complaint that U.S. industry requires additional remedies against dumping is inappropriate for judicial consideration. This Court has repeatedly emphasized that the judiciary should not be asked to resolve policy issues which properly belong within the purview of the political branches of government:

> The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.

Texas Industries, Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630, 647 (1981) (quoting *Diamond* v. *Chakrabarty*, 447 U.S. 303, 317 (1980)).

The 1916 Act has been on the books, unchanged, for more than seventy years. It was originally enacted with and still contains a requirement of specific predatory intent. Since Congress has been unwilling to amend the statute to make it applicable to other kinds of "dumping," this Court should not countenance any request to do so.[16]

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16 Bills seeking to weaken or eliminate the 1916 Act's predatory intent requirement have been proposed since at least 1982, but none of them has been enacted. *See, e.g.*, S.2517, 97th Cong., 2d Sess. (1982), S.127, 98th Cong., 1st Sess. (1983), S.1655, 99th Cong., 2d Sess. (1986). This issue is once again before the 100th Congress. *See* S.361, 100th Cong., 1st Sess. (1987).

CONCLUSION

After sixteen years of litigation, the court of appeals reviewed the entire record in this case and held that petitioners have failed to produce legally sufficient evidence to support their 1916 Act claims. Petitioners present no valid reason for this Court to review that fact-bound determination. Accordingly, the petition for a writ of certiorari or mandamus should be denied.

April 10, 1987

Respectfully submitted,

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APPENDIX

STATEMENTS PURSUANT TO RULE 28.1

Rule 28.1 Statement of Respondents Matsushita Electric Industrial Co., Ltd., Matsushita Electric Corporation of America, Matsushita Electric Trading Co., Ltd., and Matsushita Electronics Corporation

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondents Matsushita Electric Industrial Co., Ltd., Matsushita Electric Corporation of America, Matsushita Electric Trading Co., Ltd., and Matsushita Electronics Corporation submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly owned, publicly-traded foreign affiliates of Respondents Matsushita Electric Industrial Co., Ltd., Matsushita Electric Corporation of America, Matsushita Electric Trading Co., Ltd., and/or Matsushita Electronics Corporation: Matsushita Communication Industrial Co., Ltd.; Matsushita Refrigeration Company; Victor Company of Japan; Kyushu Matsushita Electric Co., Ltd.; Matsushita Seiko Co., Ltd.; Matsushita Kotobuki Electronics Industries, Ltd.; Matsushita Electric Works, Ltd.; Miyata Industry Co., Ltd.; National House Industrial Co., Ltd.; Asahi National Lighting Corporation Ltd.; Wakayama Precision Company; Precision Electronics Corporation; and Matsushita Electric Co., (Malaysia) Bhd.

Rule 28.1 Statement of Respondents Toshiba Corporation and Toshiba America Inc.

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondents Toshiba Corporation and Toshiba America Inc. submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly-owned, publicly-traded foreign affiliates of Respondents Toshiba Corporation and/or Toshiba America Inc.: Toshiba

Machine Co., Ltd.; Toshiba Ceramics Co., Ltd.; Toshiba Steel Tube Co., Ltd.; Tokyo Optical Co., Ltd.; Toshiba Glass Co., Ltd.; Toshiba Tungaloy Co., Ltd.; Maroon Electronics Co., Ltd.; Tokyo Electric Co., Ltd.; Toshiba Medical Systems Co., Ltd.; Nishishiba Electric Co., Ltd.; Shibaura Engineering Works Co., Ltd; Kitashiba Electric Co., Ltd.; Toshiba Engineering & Construction Co., Ltd.; Onkyo Corporation; Toshiba Electronic Systems Co., Ltd.; Toshiba Components Co., Ltd.; Toshiba Silicone Co., Ltd. Semp Toshiba Amazonas S.A. (Brazil); Toshiba Anand Batteries Ltd. (India); Ceylon Bulbs & Electricals Ltd. (Sri Lanka); Thai Toshiba Electric Industries Co., Ltd. (Thailand); Thai Toshiba Fluorescent Lamp Co., Ltd. (Thailand); Thai Toshiba Lighting Co., Ltd. (Thailand); Mycom Bhd. (Malaysia); Taiwan Television Enterprise Ltd. (Taiwan); Korea Electronics Co., Ltd. (Korea); Orion Electric Co., Ltd. (Korea); Han Kwang Electric Co., Ltd. (Korea); Leechun Electric Co., Ltd. (Korea); Tatung Co. (Taiwan); Taiwan Fluorescent Lamp Co., Ltd. (Taiwan); Toshiba de Panama S.A. (Panama); Toshiba Medical do Brasil Ltda. (Brazil); Toshiba International Company Ltd. (United Kingdom); Toshiba Medical Systems Ltd. (United Kingdom); Toshiba Medical Systems nv/sa (Belgium); Toshiba Medical Systems G.m.b.H. (West Germany); Toshiba (Schweiz) AG (Switzerland); Toshiba Medical Systems AG (Switzerland); Toshiba Medical Systems SrL (Italy); Toshiba Medical Systems S.A. (Spain); Man On Toshiba Limited (Hong Kong); Toshiba Electronics Taiwan Corp. (Taiwan); Toshiba Thailand Company Ltd. (Thailand); Toshiba Sales and Services Sdn. Bhd. (Malaysia); Toshiba International Corporation Pty., Ltd. (Australia); Toshiba Semiconductor Inc. (U.S.A.); Industria Mexicana Toshiba S.A. (Mexico); Toshiba do Brasil S.A. (Brazil); Toshiba Westinghouse Electronics Corp. (U.S.A.); International Fuel Cells Corp. (U.S.A.); Toshiba Information Systems (UK) Ltd. (United Kingdom); Toshiba Consumer Products (France) S.A.; Toshiba Systèmes France S.A. (France); Compagnie Européenne de Fabrication d'Enceintes (France); and Micro Ondes S.A.R.L. (France).

Rule 28.1 Statement of Respondents Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha, and Hitachi Sales Corporation of America

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondents Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha, and Hitachi Sales Corporation of America submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly-owned, publicly-traded foreign affiliates of Respondents Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha, and/or Hitachi Sales Corporation of America; Hitachi Cable, Ltd.; Hitachi Metals, Ltd.; Hitachi Chemical Co., Ltd.; Hitachi Construction Machinery Co., Ltd.; Hitachi Maxell, Ltd.; Babcock-Hitachi, K.K.; Hitachi Denshi, Ltd.; Japan Servo Co., Ltd.; Hitachi Kiden Kogyo, Ltd.; Hitachi Medical Corporation; Nippo Tsushin Kogyo Co., Ltd.; Asahi Kogyo Co., Ltd.; Hitachi Credit Corporation; Hitachi Plant Engineering & Construction Co., Ltd.; Nissei Sangyo Co., Ltd.; Nippon Business Consultant Co., Ltd.; Hitachi Printing Co., Ltd.; Hitachi Electronic Devices (Singapore) Pte., Ltd.; Hitachi Consumer Products (S) Pte., Ltd.; Hitachi Semiconductor (Malaysia) Pte., Ltd.; Hitachi Sales Australia Pty., Ltd.; High Voltage Breakers, Inc.; Hitachi Instruments, Inc.; Maxell America Inc.; Hitachi Transport System, Ltd.; Hitachi Construction Machinery (America), Corp.; and Hitachi France (Radio-TV Electro-Manager) S.A.

Rule 28.1 Statement of Respondents Mitsubishi Electric Corporation (MELCO) and Mitsubishi Electric Sales America, Inc.

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondents Mitsubishi Electric Corporation and Mitsubishi Electric Sales America, Inc., submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly-owned, publicly-traded for-

eign affiliates of Respondents Mitsubishi Electric Corporation and/or Mitsubishi Electric Sales America, Inc.: Nagoya Mitsubishi Electric Equipment Sales (Inc.); Kansai Mitsubishi Electric Products Sales (Inc.); Hokuriku Mitsubishi Electric Products Sales (Inc.); Bingo Electronic Computation Center (Inc.); Ryoei Facilities Service (Inc.); Sowa (Inc.); Meldas System Engineering (Inc.); Shinbishi Electric (Inc.); Melco Overseas Service (Inc.); Kodensha (Inc.); Shimada Rika Industry (Inc.); Toyo Electric (Inc.); Nakayama Machinery (Inc.); Ryowa Trade and Industry (Inc.); Ryoden Elevator Facilities (Inc.); Mitsubishi Space Software (Inc.); Taku Industry (Inc.); Mecom Okitac Systems (Inc.); Toyo Machinery Industry Works (Inc.); Ryoko Computation Center (Inc.); Melcom Service (Inc.); Tanto Kosan (Inc.); Daito Industry (Inc.); Tyoden Industrial Machinery; Service Engineering (Inc.); Mitsubishi Industrial Software (Inc.); Sanwa Electric (Inc.); Melco de Mexico S.A. de C.V.; Ascenseurs Mitsubishi France S.A.; United Electronic Engineering Corp. (pte) Ltd.; Ryoden (Singapore) Pte. Ltd.; Ryoden Merchandising Co., Ltd.; Melco de Colombia Ltda.; Mitsubishi Electric Saudi Ltd.; Kanagawa Electric (Inc.); Daiichi Electric Industry (Inc.); Shizuki Electric Works (Inc.); Ryoden Trading (Inc.); Nippon Kentetsu (Inc.); and Shin Yeong Electric Corporation.

Rule 28.1 Statement of Respondents Sharp Corporation and Sharp Electronics Corporation

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondents Sharp Corporation and Sharp Electronics Corporation submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly-owned, publicly-traded foreign affiliates of Respondents Sharp Corporation and/or Sharp Electronics Corporation: Hycom, Inc.; Sampo Corp.; and Sharp Electronics Sales Corp.

Rule 28.1 Statement of Respondents Mitsubishi Corporation and Mitsubishi International Corporation

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondents Mitsubishi Corporation and Mitsubishi International Corporation submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly-owned, publicly-traded foreign affiliates of Respondents Mitsubishi Corporation and/or Mitsubishi International Corporation: Japan Aircraft Maintenance (America), Inc.; Mitsubishi International Warehouse Corporation; Coilplus, Inc.; Hishi Plastics USA, Inc.; Mitsubishi Acceptance Corporation; MIC/MAC Corporation; Mitsubishi Engine North America Inc.; Nature Snak Inc.; Memory Tech Inc.; Sushiden America, Inc.; Nihon Shokuhin Kakoo K.K.; Dahlia Mining Co., Ltd.; Chino Mines Company; Diamond Vision Inc., U.S.A.; Mitsubishi Motor Sales of America, Inc.; Machinery Distribution, Inc.; Dosanko Foods Inc.; Nitto Seifun K.K.; Chuukyoo Coca Cola Bottling; G.S. Steel Co., Ltd.; Mitsubishi Motors Australia, Ltd.; and Crestbrook Forest Industries, Ltd.

Rule 28.1 Statement of Respondents Sanyo Electric Co., Ltd., Sanyo Electric Trading Co., Ltd., Sanyo Electric, Inc., and Sanyo Manufacturing Corporation

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondents Sanyo Electric Co., Ltd., Sanyo Electric Trading Co., Ltd., Sanyo Electric Inc., and Sanyo Manufacturing Corporation submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly-owned publicly-traded foreign affiliates of Respondents Sanyo Electric Co., Ltd., Sanyo Electric Trading Co., Ltd., Sanyo Electric Inc., and/or Sanyo Manufacturing Corporation: Sanyo E & E Corporation; Sanyo

Business Systems Corporation; Tocabi America Corporation; Icon Systems & Software, Inc.; Sanyo Industries (Malaysia) Bhd. (Malaysia); and Autocrat Sanyo Holdings (New Zealand). In addition, Sears, Roebuck and Co. owns 25.4% share of the stock of Respondent Sanyo Manufacturing Corporation.